S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Petitioner-Appellee,	UNPUBLISHED March 20, 2007
v	No. 267091 Wayne Circuit Court Family Division
DEANGELO ANTONIO WHEELER, Respondent-Appellant.	LC No. 03-420464-DL

Before: Cooper, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Following a jury trial, respondent was adjudicated responsible for assault with intent to commit criminal sexual conduct (CSC), MCL 750.520g(1). Respondent was sentenced to juvenile detention in a medium security facility. Respondent appeals as of right. We affirm.

First, respondent claims that there was insufficient legally admissible evidence to support his adjudication. We disagree.

When reviewing a claim of insufficient evidence, this Court reviews the record de novo. See, e.g., *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). This Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of assault with intent to commit CSC involving penetration are: "(1) an assault, and (2) an intent to commit CSC involving sexual penetration." *People v Nickens*, 470 Mich 622, 627; 685 NW2d 657 (2004). The trial testimony of the victim established that respondent came to the victim's home asking for the victim's grandfather. Despite being told by the victim that her grandfather was not home and that respondent should leave, respondent entered the residence and began following the victim and her sister around the house and eventually into the basement. After the victim's sister left the basement to go upstairs, respondent grabbed the victim's arm and pulled her into an adjacent laundry room and closed the door. Respondent then picked up the victim, placed her atop the clothes dryer, pulled down her pants and underwear, unzipped his own pants, and allegedly put his penis into her vagina. Respondent stopped when the victim's mother and grandmother entered the house.

Although the victim was only eight years old at the time of the incident, and ten years old at the time of trial, she adequately demonstrated that she knew the difference between the truth and a lie and maintained that she would tell the truth during her testimony. Respondent has been unable to advance a compelling argument with respect to why the victim's testimony should be deemed patently incredible. We note that nothing on the record suggests that there were any problems or animosity between the parties before the assault that might conceivably have provided the victim or her mother with a motive to falsely accuse respondent. To the contrary, the mother testified that she considered respondent a member of her extended family and respondent's mother a good friend of hers. Furthermore, the mother's testimony regarding what the victim told her about the sexual assault matches the victim's own testimony.

A fact-finder is in a superior position to judge witnesses' credibility. For this reason, appellate courts defer to the fact-finder's resolution of factual issues, especially when the issues involve witness credibility. *People v Parker*, 230 Mich App 337, 341; 584 NW2d 336 (1998). Based upon the testimony of the victim and her mother, there was sufficient evidence for the jury to have adjudicated respondent responsible for the charged offense.

Respondent alleges that hearsay testimony was improperly admitted two different times during trial and served to taint the jury's verdict. Hearsay is a statement offered by someone other than the declarant to prove the truth of the matter asserted; it is generally inadmissible unless subject to an enumerated exception. *People v McGhee*, 268 Mich App 600, 639; 709 NW2d 595 (2005); MRE 801(c); MRE 802. According to respondent, the first impropriety occurred when the victim's mother was allowed to testify that doctors diagnosed the victim with a sexually transmitted disease (STD). Respondent objected to the testimony, and the prosecutor responded that the testimony was not offered to prove the truth of the matter asserted, but rather to show the basis for the victim's mother's concern and her subsequent questioning of her daughter. A statement not offered for the truth of matter asserted is not hearsay. *People v Jones*, 228 Mich App 191, 206-207; 579 NW2d 82, mod and remanded on other grounds 458 Mich 861 (1998). In this particular instance, it did not matter for the prosecutor's purpose whether the victim in fact had an STD; rather, it mattered that the victim's mother was told by doctors that the victim had an STD; this shed light on why the victim's mother began questioning her daughter about whether anyone had done anything to her. The victim's mother's belief that the victim had an STD played an integral part in the unfolding of the sexual assault story. But for the challenged testimony, the jury would be uninformed with respect to why the victim's mother suddenly began questioning the victim regarding whether someone had touched her inappropriately.

Generally, all relevant evidence is admissible. MRE 402. "Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point." *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Because the challenged testimony was relevant and not offered to prove the truth of the matter asserted, the trial court did not err in admitting it.

The second alleged instance of hearsay involves the mother's testimony concerning what the victim relayed to her about the sexual assault. The victim's mother testified that upon her questioning of the victim, the victim eventually admitted to her that while the mother was away playing bingo, respondent put the victim atop the clothes dryer in the basement and put his penis in her vagina. At this point in the testimony, counsel lodged an objection, asserting that the testimony was hearsay. The trial court overruled the objection, concluding that the excited

utterance exception applied. An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Certainly the victim's statement related to a startling event – her sexual assault. Whether the victim's statement was made while she was under the stress of excitement caused by the event is not as clear. Although the time that passed between the startling event and the utterance is relevant in determining whether the declarant was still under the stress of the event, it is not dispositive, and it is necessary to consider whether there was a plausible explanation for the delay. *Smith, supra* at 551. Physical factors, such as shock or fear, may prolong the period during which the risk of fabrication is minimal. *Smith, supra* at 552. "The trial court's determination whether the declarant was still under the stress of the event is given wide discretion." *Smith, supra* at 552.

Although the time span involved in the classic excited utterance scenario is less than the two-month time span involved in the instant case, an argument could conceivably be made that, given the traumatic nature of a sexual assault, the victim's young age, her fear of getting into trouble with her mother if she were to reveal what happened to her, and the recent questioning by the mother, the victim could be said to still have been under the stress of the sexual assault.[1] At any rate, even if the excited utterance exception was inapplicable, the challenged testimony was admissible under MRE 803A, which states, in relevant part:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

[1] We note that in *People v Layher*, 238 Mich App 573; 607 NW2d 91 (1999), cited by the concurring judge, the complainant initially made two statements "immediately after the incident, both at home and at the hospital." *Id.* at 582. The complainant then made a third statement during a therapy session "one week after the alleged incident . . . ." *Id.* at 582. It is with regard to this third statement that the defendant made his "improper time lag" argument. *Id.* at 583. The Court rejected defendant's argument and deemed this third statement an excited utterance, despite the time that had passed between the assault and the statement. *Id.* at 584. The Court also deemed the third statement admissible despite the fact that it had been produced during a therapy session and with the use of anatomical dolls. *Id.* at 582-584. At any rate, we emphasize that our ultimate disposition in the instant case rests on the admissibility of the statement under MRE 803A and not under the excited utterance exception to the hearsay rule.

(4) the statement is introduced through the testimony of someone other than the declarant.

First, the victim was eight years old at the time that she recounted to her mother the incident of sexual assault. Second, the victim's statement was spontaneous and without indication of manufacture. Indeed, there is no evidence to suggest that the victim's mother, or anyone else for that matter, pressured the victim to state that she had been sexually assaulted. Third, approximately one and a half to two months elapsed from the time the victim was assaulted to the time she spoke about it. The victim testified that she did not speak about it earlier because she was afraid her mother would yell at her. MRE 803A(3) allows for a delay in making the statement due to fear. Fourth, the victim's testimony was introduced by her mother. Because all the requirements of MRE 803A were met, there was no error requiring reversal with regard to the admission of the challenged testimony.

Respondent next contends that prosecutorial misconduct denied him the right to a fair trial. We disagree.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). However, this Court reviews defendant's unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *Id*.; *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, defendant must establish that (1) an error occurred; (2) the error was plain; and (3) the plain error affected defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). Even where such error is shown, reversal of a conviction is warranted only when the established plain error resulted in the conviction of an actually innocent defendant or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, *supra* at 763-764.

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutorial comments must be "evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial . . . ." *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

The first alleged instance of prosecutorial misconduct occurred when the prosecutor elicited testimony from the victim's mother that she was told by the victim's treating physician that the victim had an STD. It was at this point that counsel objected, asserting hearsay. As discussed *infra*, the challenged testimony was not hearsay because it was not presented for the truth of the matter asserted. *Jones*, *supra* at 206-207. Therefore, the prosecutor did not commit misconduct in eliciting the testimony.

Next, respondent argues that the prosecutor acted improperly by remarking during his arguments that the victim had an STD and that the presence of the STD bolstered the victim's credibility. First, it is noted that counsel did not object to the prosecutor's remarks. Second, defense counsel appears to have attempted to use the STD issue to respondent's advantage.

Defense counsel elicited testimony and made statements that assumed that the victim had an STD. For instance, counsel questioned the mother concerning her shock upon learning that the victim had an STD and asked the mother whether the redness around the victim's vagina was a symptom of the STD. During arguments, counsel made note of the fact that there was no evidence that respondent suffered from an STD and contended that someone other than respondent was likely to have transmitted the STD to the victim. Apparently, at least one of counsel's strategies involved using the victim's STD to respondent's advantage. In light of respondent's use of the same testimony that he now challenges, the prosecutor's comments were not of such a nature as to seriously affect the fairness, integrity, or public reputation of the proceedings. *Carines, supra* at 763-764.

Moreover, none of the prosecutorial remarks appears to have been so prejudicial or serious as to affect the outcome of the proceedings. There was ample evidence against respondent. The victim's uncontroverted testimony established that she was sexually assaulted by respondent. This proposition was corroborated by the mother's testimony. To the extent that the STD references were improper, the error was harmless, given the evidence against respondent. Reversal is unwarranted.

Lastly, respondent alleges that he was provided with ineffective assistance of counsel. We disagree.

Determining whether a defendant has been deprived of the effective assistance of counsel involves a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first "find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel's performance must be measured against an objective standard of reasonableness and evaluated without the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

First, respondent finds fault with counsel's failure to follow up on his initial objection to the mother's testimony that doctors informed her that the victim had an STD. When counsel lodged a hearsay objection to the challenged testimony, the trial court sided with the prosecutor in concluding that the testimony was not hearsay because it was not being offered to prove the truth of the matter asserted. As discussed *infra*, the trial court's ruling on this matter was correct. Given that the testimony was admissible, further pursuing an objection to the testimony would have been fruitless. A failure to pursue a meritless objection does not constitute ineffective assistance of counsel. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Likewise, a failure to object to the court's excited utterance ruling did not constitute ineffective assistance of counsel, given the admissibility of the evidence under MRE 803A.

Additionally, counsel was not ineffective for failing to object to the prosecutor's remarks concerning the victim's having an STD. A review of the record suggests that defense counsel elicited testimony and made comments concerning the victim's having an STD. As discussed *infra*, this appears to have been done for purposes of trial strategy. This Court will not substitute its judgment for that of counsel in a matter of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). That a trial strategy is ultimately unsuccessful does not render counsel ineffective for using it. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Lastly, respondent argues that counsel was ineffective for failing to move for a mistrial after the jury submitted questions regarding the particulars of the STD. "[A] mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). We note that respondent cites no authority establishing that a mistrial should have been granted, much less that a mistrial would likely have been granted had it been requested. See, generally, *Watson*, *supra* at 587. Under all the circumstances, we simply cannot conclude that counsel was ineffective for failing to move for a mistrial, or that, but for counsel's failure to move for a mistrial, the outcome of the proceedings would have been different. *Rogers*, *supra* at 714. Consequently, respondent's challenges to the effectiveness of his trial counsel are rejected.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Patrick M. Meter